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NO. 08-

IN THE

Supreme Court of the United States

DARLETA ROCHELLE JOHNSON,

Petitioner,

v.

TRANSIT MIX CONCRETE & MATERIALS CO. AND TRINITY MATERIALS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the Texas Court of Appeals for the Eleventh District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Mine Safety and Health Act, 30 U.S.C. § 801 *et seq.*, preempts less stringent state law and imposes upon a mine's owner-operator a nondelegable duty to follow mandatory safety standards promulgated under the Act's authority so that a violation of those standards constitutes evidence of negligence for injuries suffered by workers at the mine site, regardless of whether they are employed by the principal or by an independent contractor?

PARTIES TO THE PROCEEDINGS

Petitioner is Darleta Rochelle Johnson, individually, as representative of the estate, and as next friend of Brad Johnson, Jr., Jerelle Johnson, and Amethyst Johnson, minors.

Respondents are Transit Mix Concrete & Materials Co. and Trinity Materials, Inc., treated below by stipulation as a single entity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Darleta Rochelle Johnson respectfully petitions for a writ of certiorari to review the judgment of the Texas Court of Appeals for the Eleventh District in this case.

OPINIONS BELOW

The opinion of the Texas Court of Appeals for the Eleventh District (App., *infra*, 1a-6a) is reported at 205 S.W.3d 92. Review was denied by the Texas Supreme Court. (App., *infra*, 19a). The judgment of the 58th District Court, Jefferson County, Texas (App. *infra*, 7a-18a) is unreported.

JURISDICTION

The Texas Supreme Court denied review on February 22, 2008 and denied rehearing of the petition for review on June 27, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED (SEE APPENDIX 22a-65a)

Pertinent provisions of the U.S. Const. art VI are given at App. 21a.

Pertinent provisions of the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801-964 are given at App. 23a-52a.

Pertinent provisions of 30 C.F.R. § 46 and § 48 are given at App. 53a-64a.

INTRODUCTION

This petition seeks review of a decision by the Texas Court of Appeals, which completely ignored the preemptive and superseding impact of federal law on Texas's treatment of a mine operator's liability for fatal injuries suffered by a worker on its property. Applying the general rule that a principal owes no duty to a worker employed by an independent contractor and failing to address relevant federal law establishing such a nondelegable duty, the court vacated a jury verdict already remitted by the trial judge.

State courts that have considered the question presented have split on whether the Federal Mine Safety and Health Act, 30 U.S.C. §§ 801-964 ("Mine Act"), imposes civil liability on the mine's owner-operator for violations of mandatory health and safety requirements when an independent contractor's employee is injured. The federal circuits, however, have uniformly found that an owner-operator and qualified independent contractors are jointly liable administratively for such violations resulting in injuries.

The court below drew a distinction between the health and safety responsibilities owed by the mine owner to its own employees and those workers on its premises but employed by independent contractors, when the Mine Act specifically eschews that distinction. In fact, although the Texas Court of Appeals concluded that the mine's operator had no responsibility for the fatal injury in this matter, the federal Mine Safety and Health Administration issued a citation to that operator, Respondent

Transit Mix, for its violation of mandatory safety standards resulting in that death. (*See* App. 73a-74a)

In enacting the original Mine Act in 1969, and then enacting a successor statute in 1977, Congress recognized that work at mine sites remains one of the most dangerous of jobs. The 1977 Act adopted the prevailing judicial construction and expanded the definition of "miner" to include employees of independent contractors working at the mine site, even when their work did not consist of what is generally thought of as mining. The regulations promulgated pursuant to the Mine Act's authority are mandatory and include training responsibilities on the part of the owner-operator for employees of independent contractors. A failure to implement those standards and provide necessary training in this particular instance proved fatal.

State courts' diffidence on owner-operators' responsibility for independent contractors frustrates the federal remedial purpose behind the Act and undermines the health and safety of those working at a mine, contrary to the express purpose of the federal act, which seeks to instill greater safety at a palpably dangerous worksite and recognizes that those dangers equally affect independent contractors.

STATEMENT OF THE CASE

A. Factual Background

Brad Johnson, Sr., died as a result of injuries received in February 1999 while working at a sand and gravel mine owned and operated by defendants Transit Mix Concrete & Materials Co. and Trinity

Materials, Inc., treated below by stipulation as a single entity (hereinafter "Transit Mix"). Johnson was employed by RDO Equipment Company, a dealer in heavy equipment which would detail its mechanics to work with Transit Mix's maintenance personnel at the mine on problems with the equipment. Johnson was sent to the mine, where a Transit Mix supervisor assigned Johnson to effect brake repairs on a massive dirt hauler, known as a Euclid B-30, even though Johnson had never worked on the enormous vehicle before. Mandatory federal regulations and the mining company's own rules required Transit Mix to provide Johnson with training in the safe discharge of the assigned task. Transit Mix was alerted to the danger months earlier when the agency had sent a relevant alert, known as a fatalgram, about a fatality at a mine involving precisely the danger that killed Johnson. Transit Mix undertook no training, but it did supply Johnson with equipment and tools to accomplish the work, specified how the work could be accomplished, assisted him in attempting to complete the task, and supervised the job.

To access the brakes, Johnson had to remove a six-foot high tire, weighing 1,500 pounds. (App. at 69a). The tire was stuck on the vehicle from dried and caked mud and sand. Johnson consulted with Transit Mix employees and undertook the task of removing the tire together with them, to no avail. (6 RR 99, 112, 114, 116-17; App. at 71a). Johnson eventually suggested using heat to dislodge the debris. A Transit Mix supervisor acceded to the plan,

and Johnson was supplied with a Transit Mix acetylene torch.[1] (5 RR 104-06; 6 RR 117).

After one oxygen tank for the torch was expended, a second was supplied. (6 RR 152). The Transit Mix supervisor for the task, then passing by, saw Johnson undertake use of the torch, but apparently found it appropriate and said "Okay" when Brad said he was trying to remove the wheel with heat. (4 RR 250-52). The heat from the torch, however, ignited gases in the tire, causing it to explode. (6 RR 120; App. at 72a). Johnson was thrown by the explosion, his pants leg was on fire, and he lay unconscious without a pulse. (App. at 72a). The fire was put out, and Johnson began to breathe again after first aid was administered. (*Id.*). The explosion caused Johnson severe injuries including a badly damaged left lung and arm, multiple left rib fractures, and a broken jaw. (7 RR 7-10). In treatment, Johnson's left arm was amputated, he was outfitted with draining tubes for his injured lung, and he was subjected to a tracheotomy. (7 RR 9-11). Nonetheless, he died 13 days later from complete organ failure. (7 RR 11).

Only months earlier, the federal Mine Safety and Health Administration (MSHA) had notified all mine operators, including Transit Mix, that a worker at another mine had died in an explosion resulting from the application of heat to a similar huge tire. MSHA warned mine operators never to apply heat to a tire

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[1] Under longstanding Texas precedent, the very "act of furnishing the trappings" needed for the task meant that "[defendant] considered . . . their use . . . necessary to the proper and successful execution of the work confided to [the independent contractor]." *Drennon v. Patton-Worsham Drug Co.*, 109 S.W. 218, 219 (Tex. App. 1908).

rim. (Px 28, 29). The fatalgram notice was the type of bulletin that neither Johnson nor his employer would ever have seen because it was directed solely to mine operators under MSHA's jurisdiction. Transit Mix officials later admitted that, if they had heeded the warning, Johnson's death would not have occurred. (3 RR 15; 4 RR 53-56, 114-15, 119, 165).

B. Proceedings Below

Johnson's widow, Darleta Rochelle Johnson, brought suit on her own behalf, on behalf of Johnson's estate, and on behalf of his three minor children. After a trial in the 58th District Court, Jefferson County, a jury awarded Johnson's estate and survivors nearly $164 million in damages. The trial court remitted the award to $27,357,090.83. (App. at 16a).

The Texas Court of Appeals for the 11th District (Eastland), reversed, holding that Transit Mix did not exercise sufficient control over Johnson so as to create any duty to him under Texas law. The court employed the general rule that a principal owes no duty to an independent contractor unless the principal retains some control over the manner in which the work is performed. (App. at 4a-5a). The court of appeals specifically found that Transit Mix employees made suggestions but did not provide the type of detailed instructions that would amount to control. (App. at 3a). The court's opinion did not mention or discuss the Mine Act or its regulations, or its relationship to the determination of whether Transit Mix owed Johnson any duty, even though Plaintiff asserted its relevance. The Texas Supreme Court declined further review. (App. at 19a).

REASONS FOR GRANTING THE PETITION

This case raises an important issue concerning whether states may frustrate a nondelegable federal duty to the safety of all workers on the part of a mine's owner-operator by either ignoring federal law or discounting it in the course of a state tort case. Congress enacted the Mine Act in the knowledge that mining operations are among the most dangerous worksites in America. *See* 30 U.S.C. § 801(b). In doing so, Congress recognized dangers inherent in mining operations and the "tragic consequences" it can entail. *Speed Mining, Inc. v. Fed. Mine Safety and Health Review Comm'n*, 528 F.3d 310, 316 (4th Cir. 2008).

The Act announces that the "first priority" in any mining operation must be "the health and safety of its most precious resource--the miner." 30 U.S.C. § 801(a). It further expresses its concern with "deaths and serious injuries from unsafe and unhealthful conditions and practices" at mines, as well as the "urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm." *Id.* at 801(b) & (c). The Act acknowledges that "primary responsibility" to assure safety rests with the "operators of such mines." *Id.* at 801(e).

The Act purposely defines the term "miners" expansively to include all who work on the mine property, whether employed by the principal or an independent contractor regardless of its role. 30 U.S.C. § 802(g) (a miner is "any individual working

in a coal or other mine"). *See also Bituminous Coal Operators Ass'n v. Sec'y of Interior*, 547 F.2d 240, 245 (4th Cir. 1977) (recognizing that a contractor's employee qualifies as a miner for purposes of the Mine Act).

A Senate report accompanying the Mine Act states that Congress intended to adopt the Fourth Circuit's broad reading in *Bituminous Coal* of the predecessor act to assure coverage of independent contractors. S. Rep. No. 95-181, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3401, 3414 (hereinafter Senate Report). *See also Joy Technologies Inc. v. Sec'y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996) (describing the progression from interpretation in *Bituminous Coal* to statutory confirmation in the 1977 Miner's Act).

The statutory terminology regarding working in a mine embraces "a sweeping definition for a mine, encompassing much more than the usual meaning attributed to it." *In re Kaiser Aluminum and Chem. Co.*, 214 F.3d 586, 590 (5th Cir. 2000), citing *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 936 (6th Cir. 1997). It includes both the area of land from which minerals are extracted, as well as "facilities . . . used in, or to be used in . . . the milling of such minerals." 30 U.S.C. § 802(h)(1). As a result, the Mine Act means what it says and covers "*any* independent contractor performing services at a mine." *Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285, 1290 (D.C. Cir. 1990). *See also Speed Mining*, 528 F.3d at 314 (calling this conclusion the subject of "uncontradicted precedent"); *Joy Technologies*, 99 F.3d at 999 (finding an independent contractor covered by the Mine Act for work servicing

equipment similar to the work undertaken by Johnson in the instant case).

Applying that inclusive approach, the Fourth Circuit has held that "[i]t is settled law in this and other circuits that the Secretary [of Labor] possesses the discretionary authority to cite owner-operators, independent contractors, or both for safety violations committed by independent contractors." *Speed Mining*, 528 F.3d at 311; *see also Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006); *Cyprus Indus. Minerals Co., v. Fed. Mine Safety and Health Review Comm'n*, 664 F.2d 1116, 1119 (9th Cir. 1981). Thus, every circuit recognizes that federal law imputes violations of an independent contractor to the owner-operator.

Among the Mine Act's stated purposes is the establishment of "mandatory health and safety standards." 30 U.S.C. § 801(g); *see also Sec'y of Labor v. Cannelton Indus. Inc.*, 867 F.2d 1432, 1433 (D.C. Cir. 1989). It is standard practice to "construe broadly the Act's coverage to achieve this goal." *United Energy Servs., Inc. v. Fed. Mine Safety & Health Admin.*, 35 F.3d 971, 975 (4th Cir. 1994); *see also Cannelton Indus.*, 867 F.2d at 1437 (concluding that Congress intended the Mine Act to be construed liberally to accomplish its remedial purposes); *Cyprus Indus.*, 664 F.2d at 1118 (same). Thus, the Tenth Circuit agreed with the Secretary of Labor that the Act treats an independent contractor, "unmoored from its common law meaning," in a manner calculated "to accomplish the remedial purposes of the statute." *Joy Technologies*, 99 F.3d at 996.

Pursuant to the Act's authorization, the Secretary of Labor has promulgated "mandatory health [and] safety standards" for the mining industry. *Id.* at § 811; *Bituminous Coal,* 547 F.2d at 242. The Secretary is also empowered to issue citations to mine operators who have violated the Mine Act or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to its authority, 30 U.S.C. § 814(a), or to assess civil penalties against any such operator. *Id.* at §§ 815, 820(a). Those mandatory safety standards are found at 30 C.F.R. Part 77. The Secretary's authority includes citations for failure to provide training pursuant to MSHA regulations. *See* 30 C.F.R. § 46.12.

As Congress understood, independent contractors are frequently employed by a mine's operator to assist with its operations, and "contractors' employees are frequently subjected to the same hazards as miners." *Bituminous Coal,* 547 F.2d at 243, 245. Thus, the Act plainly treats owner-operators of mines liable for the safety violations of independent contractors that it employs. *Speed Mining,* 528 F.3d at 314-15. Recently, the Fourth Circuit observed that "[p]recluding owner-operator liability for independent contractor violations would encourage owners to use contractors as a means of insulating themselves from safety regulations." *Id.* at 315. After all, owner-operators are "generally in continuous control of [mine] conditions" and are "more likely to know the federal safety and health requirements." *Cyprus Indus.,* 664 F.2d at 1119.

Significantly, explicit preemptive language is found in the Act, which states:

> No State law in effect on December 30, 1969 or which may become effective thereafter shall be superseded by any provision of this chapter or order issued or any mandatory health or safety standard, *except insofar as such State law is in conflict with this chapter or with any order issued or any mandatory health or safety standard.*

30 U.S.C. § 955(a) (emphasis added). The preemptive language goes on to state that "more stringent health and safety standards" may be imposed by the state and will not be regarded to be in conflict. 30 U.S.C. Sec. 955(b). Thus, the Mine Act makes clear that every state must at least require mines to meet the federal health and safety standards, even though the state may impose stricter standards.

Texas law,[2] insofar as it imposes no duty on the part of a mine's owner-operator to an independent contractor working at the mine, plainly conflicts with the Act and the mandatory safety standards promulgated pursuant to it.

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[2] This Court has found that state tort law operates as a "requirement" and thus is subject to the preemptive effects of contrary federal requirements. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1008 (2008) (citation omitted). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (a liability award "can be, indeed is designed to be, a potent method of governing conduct and controlling policy.")

I. The Court Should Grant Certiorari to Resolve a Conflict in State Courts of Last Resort on Whether the Mine Act Imposes a Standard of Care on Mine Operators for Independent Contractors Working at Their Mines

The Texas Court of Appeals utterly ignored any import that the Mine Act and its regulations have for the determination of whether Transit Mix owed any duty to Johnson.[3] It chose not to respond to Plaintiff's brief invoking the mandatory health and safety standards promulgated pursuant to the Act. In fact, no mention of the Act, its regulations, or the safety standards can be found in the court's opinion. Other state courts have recognized the Act's potential relevance but have split on whether federal law imposes a duty cognizable in a state tort action. While Indiana has held that the Act imposes no duty, courts in Montana and Pennsylvania have reached the opposite conclusion.

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[3] Just as a defendant has a Due Process right to raise "every available defense," *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) (citation omitted), a plaintiff must have the corresponding right to raise every possible rationale to uphold a trial judgment. When the Texas Court of Appeals, and that state's Supreme Court, failed to address Johnson's legitimate federal duty argument, it not only frustrated the federal purpose, conflicted with the express preemption provision in the Mine Act, and denigrated Johnson's federal rights as established by the statutory scheme and its progeny, it may have also adversely affected Plaintiff's due-process rights by failing to provide a meaningful hearing of the claims at issue. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

Only the Indiana Supreme Court has adopted an analysis consistent with the *result* in Texas. Still, in concluding that an owner-operator owes no duty of care to an independent contractor, Indiana, unlike the Texas court, found it necessary to examine the effect of the Mine Act. Nothing about Texas law excuses that state's courts from engaging in similar analysis. Like Texas and most other states, Indiana follows the "long-standing general rule" that "a principal is not liable for the negligence of an independent contractor." *Vaughn v. Daniels Co.*, 841 N.E.2d 1133, 1143 (Ind. 2006). Like Texas, Indiana also recognizes an exception where the work is "intrinsically dangerous" or the principal is charged *by law* with performing a specific duty. *Compare id.* with *Loyd v. Herrington*, 182 S.W.2d 1003, 1004 (Tex. 1944) (inherently dangerous exception) and *Gulf, C. & S.F. Ry. Co. v. Flake*, 1882 WL 9032 (Tex. App. 1882) (statutory requirements impose nondelegable duty).

Even so, once it found the mining company owed no state-based common law duty to the independent contractor, the Indiana Supreme Court proceeded to examine whether the Mine Act's very existence changes that calculation. The court concluded that neither the Mine Act nor its regulations impose "a state law duty for purposes of tort liability of the owner for negligence of an independent contractor," relying on an analogy to the treatment of violations of the Occupational Safety and Health Administration (OSHA) regulations as not creating tort liability for independent contractors. *Vaughn*, 841 N.E.2d at 1144.[4]

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[4] Petitioner contends that no analogy should be drawn between OSHA violations and MSHA violations. The Occupational

Indiana's ruling stands in contradistinction with those of courts in Montana and Pennsylvania.[5] Despite following the same general rule as Texas and Indiana regarding the liability of principals, the Montana Supreme Court held that a mine's owner-operator "had a nondelegable duty to follow safety standards promulgated under the authority of the Mine Safety and Health Act, (MSHA), 30 U.S.C., § 801, and that violation of this standard was evidence of negligence." *Gibby v. Noranda Minerals Corp.*, 905 P.2d 126, 131 (Mont. 1995). It noted that the mine operator had a mandatory obligation to provide training to the independent contractor's employees under 30 C.F.R. §§ 48.5, 48.25. *Id.* at 131-132. The failure to discharge that obligation was a proximate cause of the injury that gave rise to the lawsuit.

Health and Safety Act imposes a duty on employers *to protect the safety of its own employees*. 29 U.S.C. § 654(a)(1). The Mine Act, however, imposes a duty on the owner-operator of a mine to protect the safety of both its employees and those of independent contractors working at the mine site. 30 U.S.C § 802(g). The divergent language in the two statutes makes a critical difference that the Indiana court missed.

[5] The Wyoming Supreme Court appears to be the only other state court to have attempted to address this question. While finding it necessary to examine the Mine Act for purposes of determining whether there is a duty to an independent contractor, the Court found that even the broad definition of "miner" does not apply to an independent contractor injured during the course of a delivery to a mine site. *Burnett v. Imerys Marble, Inc.*, 116 P.3d 460 (Wyo. 2005). The decision did not address whether a covered independent contractor is owed a duty by virtue of the Mine Act, but the pains the court took to exclude the injured worker from the Act's coverage suggest that the court found substantial merit to the claim that the Mine Act creates a duty to eligible independent contractors.

A Pennsylvania trial court similarly held that the Mine Act imposes a nondelegable duty on mine owner-operators. The court reached that conclusion against the background of the same general rule that obtains in Texas that an owner owes no duty to employees of the independent contractor. *Lieberger v. Walter Co.*, 2005 WL 3784970, 74 Pa. D. & C.4th 270, 280-281 (Pa. Com. Pl. May 11, 2005), citing *Brletich v. U.S. Steel Corp.*, 285 A.2d 133, 136 (Pa. 1971).

Finding, however, that there was a particular risk of harm and that MSHA had issued a citation to the mine's owner-operator for "violation of at least one MSHA regulation," the Pennsylvania court held that "the MSHA regulations protect a defined group-people who work at mines," a group that includes independent contractors. *Id.* at 292-293. As a result, the defendant mine's motion for summary judgment on the plaintiff's claim of negligence per se and a co-defendant's demand for contribution were denied.

The Montana and Pennsylvania courts' conclusions that violation of the Mine Act and its regulations establish a duty and provide evidence of negligence makes great sense. Just as regulatory compliance is treated as evidence that a defendant did not breach a duty, the converse ought to be true: regulatory violations constitute evidence of a breach of duty. *See* Restatement (Third) of Torts: Prods. Liab. § 4 (1998) (adopting that approach to noncompliance and compliance with product safety statutes or regulations).

The conclusions of the Montana and Pennsylvania courts are also supported by the

express preemption provision of the Mine Act, which does not permit a State to impose a less stringent safety standard than those promulgated pursuant to the Act. Having defined work at a mine as inherently dangerous and imposing a statutory duty on the mine's owner-operator, Congress created a duty that no state can deny.

Because courts in different states have treated the mandate of the Mine Act and its regulations differently for purposes of state tort liability, a conflict exists that this Court should resolve.

II. The Court Should Grant Certiorari to Resolve a Conflict between State Courts of Last Resort and the Federal Circuits on Whether the Mine Act Imposes a Standard of Care on Mine Operators for Independent Contractors Working at Their Mines

While the federal courts have not addressed an owner-operator's state tort liability for independent contractors working at mines, there is an abundance of cases where mine owner-operators have unsuccessfully argued against administrative liability for the acts of independent contractors. In fact, earlier this year, the Fourth Circuit observed that "an unbroken string of courts has found that an owner-operator and an independent contractor are 'jointly liable' for any Mine Act violations." *Speed Mining*, 528 F.3d at 316, citing *Twentymile Coal Co.*, 456 F.3d at 161; *United Mine Workers of America v. Fed. Mine Safety and Health Review Comm'n*, 840 F.2d 77, 82-83 (D.C. Cir. 1988); and *Cyprus Indus.*, 664 F.2d at 1118-19.

In an early leading case, *Bituminous Coal*, *supra*, the mine operator made an argument identical to that implicitly accepted by the Texas Court of Appeals below but rejected by the Fourth Circuit. The circuit court noted that the "mining companies take the position that construction companies are operators within the meaning of the Act, and furthermore that they are directly liable for the monetary consequences of their own violations." 547 F.2d at 246. In rejecting that assertion, as a rationale sufficient to absolve the mining company of any responsibility, the Fourth Circuit stated, "the Secretary can impose liability on a mining company for a construction company's violations" and that the law "impose[s] liability on the owner or lessee of a mine regardless of who violated the Act or created the danger." *Id.*

The Fourth Circuit concluded:

> The Act's broad definition of *agent* indicates that Congress did not intend to limit the vicarious liability of a [mine] owner or lessee to common law concepts of agency. Accordingly, we affirm the district court's ruling that operators may be held liable for construction company violations, because the construction companies are statutory agents of the owners and lessees of coal mines.

Id. at 247 (emphasis added). The court added that the Mine Act created a system of joint and several liability over violations of the act and its regulations. *Id. See also Cyprus Indus.*, 664 F.2d at 1118-19 (both

owner and independent contractor liable for safety violations by independent contractor).

More recently, the Fourth Circuit observed that the "text and purposes of the Mine Act, as well as uncontradicted precedent" makes the mine owner liable administratively for "any violations of the Mine Act committed by an independent contractor." *Speed Mining*, 528 F.3d at 314, citing *Cyprus Indus.*, 664 F.2d at 1119.

There is no justification for imposing differing standards for administrative and civil liability. Because no state can enforce a standard less than that promulgated pursuant to the Mine Act under its express preemption provision, state tort law cannot deny the existence of the federal duty. Because state courts have split on import and relevance of the Mine Act on this question while the federal circuit courts appear to be in complete harmony, a conflict exists that this Court should resolve.

III. The Decision Below is Incorrect

The Texas Court of Appeals erred by failing to account for the import that the Mine Act has for any assessment of duty to workers at a mine. Congress has spoken clearly and unambiguously to the importance of mine safety and the owner-operator's responsibility for all workers on its property. *See Cyprus Indus.*, 664 F.2d at 1120 (citation omitted) (finding it difficult to see how miner safety is encouraged by allowing a mine owner to "'exonerate itself from its statutory responsibility for the safety and health or miners merely by establishing a private contractual relationship.'").

Under its authority pursuant to the Supremacy Clause, U.S. Const. art. VI, Congress prohibited any state from creating a less stringent duty than that imposed by the Mine Act or any order issued or any mandatory health or safety standard promulgated pursuant to the Act. 30 U.S.C. § 955. Because a state tort duty constitutes a "requirement" as much as any other exercise of state regulatory authority, *Riegel*, 128 S. Ct. at 1008, the Texas court's denial that the mine's owner-operator owed any duty to an independent contractor working at its mine creates a direct and patent conflict with federal law that cannot be upheld.

Moreover at a policy level, by its design and definitions, the Mine Act recognizes that a mine's owner-operator is the only party familiar with mandatory safety standards, who receives health and safety bulletins, and who can act in response to them. *See Cyprus Indus.*, 664 F.2d at 1119 (noting that owner-operators are "generally in continuous control of [mine] conditions" and thus "more likely to know the federal safety and health requirements."). The Mine Act thus imposes an obligation on the part of the owner-operator to provide hazard training to *both its own employees as well as those of its independent contractors. See* 30 C.F.R § 46.12; *see also Speed Mining*, 528 F.3d at 313; *Twentymile Coal Co.*, 456 F.3d at 161.

State law that undermines those nondelegable duties adversely affects that clear federal policy. Recognizing the strong and sensible connection between statutory and regulatory duties and tort liability, Section 424 of the Restatement (Second) of Torts states:

> One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions.

Moreover, the Restatement also recognizes that a general contractor may not transfer liability to independent contractors and disclaim responsibility for their negligent performance where the work to be conducted is necessarily ultrahazardous work. Restatement (Second) of Torts § 413. The Mine Act embodies the conclusion of Congress that work at mines constitutes ultrahazardous work. 30 U.S.C. § 801(b); *Bituminous Coal,* 547 F.2d at 245.

Texas law traditionally follows the Restatement in both respects. In *MBank El Paso, N.A. v. Sanchez,* 836 S.W.2d 151, 153 (Tex. 1992), the Texas Supreme Court cited Section 424 of the Restatement (Second), to conclude that a party bearing a duty imposed by statute "cannot escape it by delegating it to an independent contractor." Texas also imposes liability on the part of a principal for injuries to an independent contractor when the work involves inherently dangerous activities. *Id.*, citing Section 427 of Restatement (Second) of Torts, which the Texas Supreme Court noted had achieved "near-universal" acceptance.[6] *See Lee Lewis Constr., Inc. v. Harrison,* 70 S.W.3d 778, 794-95 & n.36 (Tex. 2001).

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[6] It has long been recognized that the general rule on principal liability to an independent contractor has three basic exceptions: (1) negligence in selecting, instructing, or

The court below, however, did not consider the application of either exception to the general rule governing duty *because* it chose to take no notice of the Mine Act and its meaning in this case. It did not have the authority to ignore federal law. This Court has observed that "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citations omitted).

Ignoring federal law to absolve a principal of liability amounts to a classic violation of preemption doctrine. By doing so, the state law "stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress" in enacting the Mine Act. *Cf. Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The Texas Court of Appeals wrote the Mine Act, its regulations, orders, and safety standards and its assignment of responsibility for independent contractors out of the liability equation entirely. State courts are not authorized to disregard Federal law, and this Court should grant the petition to clarify that Federal law controls this question.

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supervising the contractor; (2) non-delegable duties arising out of some relation toward the public or by law; and (3) work which is specially, peculiarly, or inherently dangerous. *See Cooper v. U.S. Gov't and General Servs. Admin.*, 225 F. Supp. 2d 1, 5 (D.D.C. 2002), citing Restatement (Second) of Agency § 219 (1958).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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